IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN NEUMANN PILLA Plaintiff,	:	CIVIL ACTION
v.	:	
DELAWARE RIVER PORT AUTHORITY, et al.	:	NO. 98-5723

Newcomer, J. May , 1999

M E M O R A N D U M

Presently before the Court are five separate Motions to Dismiss from five groups of defendants, plaintiff's responses thereto, and defendants' replies thereto. For the reasons that follow, said Motions will be granted in part and denied in part.

I. Facts[1]

Plaintiff John Pilla was injured in an automobile accident over thirty (30) years ago, which resulted in permanent mental and physical disabilities that substantially limit his daily life activities. He was employed as a custodian by the Delaware River Port Authority ("DRPA") from 1991 until he commenced his leave of absence on February 23, 1998.

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[1]The facts are taken from the Amended Complaint and the copy of plaintiff's EEOC complaint attached to plaintiff's Amended Complaint as exhibit A, and assumed to be true for purposes of this motion. At least some of the defendants object to the EEOC complaint being included because it was allegedly not properly incorporated into the Amended Complaint. Moore's Federal Practice, in discussing Fed. R. Civ. P. 10(c) says: "A copy of written instrument that is an exhibit to a pleading becomes a part of the pleading for all purposes." 16 James Wm. Moore *et al*, *Moore's Federal Practice* ¶10.05[1] (3d Ed. 1998). Further, Fed R. Civ. P.8(f) provides: "All pleadings shall be construed as to do substantial justice." Consistent with the above rules, the Court will consider the EEOC complaint as properly incorporated. Even if the Court were to reach the opposite conclusion, since the Court would grant the plaintiff leave to file a Second Amended Complaint to correct the error, economy and efficiency dictates that the EEOC complaint be considered as a part of the pleading now.

Almost immediately after plaintiff began his work at DRPA and continuing until he took a leave of absence, his co-workers and supervisors subjected him to an allegedly harassing and discriminating environment because of his disability and sex. Two of his supervisors, Charles McCarthy and Richard Tutak, took plaintiff to a strip club during working hours, bought him drinks, and paid to have plaintiff alone in a room with a naked woman who was masturbating. McCarthy told plaintiff not to tell anyone about it. On numerous occasions, Tutak made verbal noises imitating plaintiff's speech and mental disability. On at least one occasion, McCarthy was aware of one of plaintiff's co-workers calling him "retarded" and took no action to prevent it at that time or in the future.

Other named defendants also subjected plaintiff to various indignities, including: defendant William Kelleher taped plaintiff to a chair and also took him to the strip club; defendant Anthony Gardener taped plaintiff to a chair and on another occasion threw feces-soiled toilet paper at him; defendant John Pease threw soiled toilet paper at plaintiff and ripped his clothing; and defendants William Kelleher and John Balkir stripped off plaintiff's pants. Plaintiff suffered numerous other incidents at the hands of his co-workers, including being called "retard", being referred to as one of "Jerry's kids", having various objects thrown at him, and being squirted with water, among other things. The defendants have characterized the above incidents as "horseplay".

Plaintiff, his mother, and his counsel all complained about

the conduct at different times to his foreman and supervisors, although it is not clear to whom they complained. As a result of his complaining, plaintiff was allegedly retaliated against with threats. Defendants DRPA, Paul Drayton,[2] Horace Nelson,[3] Williams, Tutak, and McCarthy allegedly failed to properly investigate, and were aware or should have been aware of the harassing conduct and retaliation and failed to properly act.

As a result of this conduct, plaintiff claims that he has suffered and continues to suffer extreme emotional, psychological and physical pain, fear, and complete humiliation, causing plaintiff to seek medical treatment from a psychiatrist.

Plaintiff's Amended Complaint alleges eight counts: (I) Discriminatory and harassing environment in violation of the Americans with Disabilities Act, 42 U.S.C. § 12111, et seq.; (II) sexual discrimination in Violation of Title VII, 42 U.S.C. § 2000e; (III) sexual discrimination in violation of 42 U.S.C. § 1983; (IV) disability and sexual discrimination in violation of the Pennsylvania Human Relations Commission Act ("PHRA"), 43 P.S. 951 et seq.; (V) negligent retention and supervision; (VI) intentional infliction of emotional distress; (VII) invasion of privacy; and (VIII) assault and battery.

The defendants have filed motions to dismiss as follows: (1) DRPA to dismiss Counts II, IV, and any claim for punitive

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[2]Paul Drayton is the Chief Executive Officer and Executive Director of the DRPA.

[3]Horace Nelson is the Walt Whitman Bridge manager.

damages[4]; Defendants Drayton[5], Nelson, Williams, McCarthy, and Tutak ("Supervisor Defendants") to dismiss counts III, IV, and VI; Defendants Gardner, Balkir, and Pease ("Co-Worker Defendants") to dismiss counts VI, VII, and VIII; and defendant Kelleher to dismiss counts VI, VII, VIII. The Court will address these motions in turn.

II. Legal Standard

Under Fed. R. Civ. P. 12(b)(6), "the applicable standard of review requires the court to accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom, and view them in the light most favorable to the non-moving party." Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). The question before the court is not whether the plaintiff will ultimately prevail; rather, it is whether the plaintiff could prove any set of facts in support of his claim that would entitle the plaintiff to relief. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

The Third Circuit employs a heightened pleading requirement for civil rights violations, requiring that "the complaint contain a modicum of factual specificity, identifying the

[4]All defendants have moved to dismiss count V, and plaintiff has chosen not to offer an argument in defense, so the Court will dismiss count V. Counts VI, VII, and VIII are inapplicable to the DRPA.

[5]Defendant Drayton filed a separate Motion to Dismiss, adopting the arguments of the Supervisor Defendants in their entirety. For that reason, the Court will deal with Drayton's Motion along with the other Supervisor Defendants.

particular conduct of defendants that is alleged to have harmed the plaintiffs." Colburn v. Upper Darby Township, 838 f.2d 663, 666 (3d Cir. 1988), cert. denied, 489 U.S. 1065 (1989). The Court goes on to note that "[t]he heightened specificity requirement for section 1983 claims does not alter the general standard for ruling on motions to dismiss under Rule 12(b)(6)." Id. Quoting Frazier v. Southeastern Pennsylvania Transp. Auth., 785 F.2d 65, 67 (3d Cir. 1986), the court stated, "the crucial questions are whether sufficient facts are pleaded to determine that the complaint is not frivolous, and to provide defendants with adequate notice to frame an answer." Colburn at 666 (citations omitted).

III. DRPA's Motion to Dismiss

Defendant DRPA has moved to dismiss two counts of Plaintiff's Amended Complaint, count II for Title VII sexual harassment, and count IV under the PHRA. DRPA argues that count II must be dismissed because plaintiff did not exhaust his administrative remedies, or in the alternative because the conduct alleged is not sufficiently severe or pervasive to constitute sexual harassment. DRPA argues that count IV, plaintiff's PHRA claim must be dismissed because plaintiff failed to exhaust his administrative remedies, or in the alternative, because the PHRA cannot constitutionally be applied to the DRPA. DRPA also moves to have claims for punitive damages stricken, arguing immunity.

A. Count II

A plaintiff must exhaust administrative remedies by filing a timely charge of discrimination with the EEOC before bringing an action under Title VII. 42 U.S.C. § 2000e5(f)(1). The charge must be filed within 180 days after the alleged conduct occurred. Id. at § 2000e-5(e)(1). DRPA argues that since there is no identifiable conduct alleged by plaintiff to comprise sexual harassment since "early 1997," and his EEOC complaint was not filed until January 21, 1998,[6] plaintiff failed to timely exhaust his administrative remedies.

Plaintiff argues that at the time of his EEOC charge, he alleged that the discriminatory action was continuing in nature, and that he alleged in his Amended Complaint that the harassing conduct continued until his leave of absence, thus enabling him to maintain his claim under the continuing violations theory. Under this theory, a plaintiff may pursue a Title VII claim for discriminatory conduct that began before the filing period if he can demonstrate that the act is part of an ongoing practice or pattern of discrimination. West v. Philadelphia Electric Company, 25 F.3d 744 (3rd Cir. 1995). In order to maintain his claim, plaintiff must first demonstrate that at least one act occurred within the filing period. Then he must establish that the harassment is "more than the occurrence of isolated or sporadic acts of intentional discrimination." Id. at 754-755 (citations omitted). Plaintiff's contemplated application of this theory is

[6]DRPA misstated the date of the filing of the EEOC complaint as November 12, 1997.

misplaced.

The continuing violation theory allows a plaintiff who has properly alleged a violation of his rights within the statutory period to include violations that have occurred outside the statutory period if he can demonstrate that the conduct was continuous. Plaintiff attempts to satisfy the requirements of the rule by specifying several violations that occurred clearly outside the statutory period, and alleging that these violations have continued. Since plaintiff is unable to point to a single act that occurred within the statutory period, the Court rules as a matter of law that he cannot maintain his Title VII claim against DRPA.

B. Count IV

In count IV of his Amended Complaint, plaintiff alleges disability and sexual discrimination in violation of the Pennsylvania Human Relation Commission, 43 P.S. 951 et seq. The threshold determination to be made is whether or not the PHRC can constitutionally be applied to the DRPA.[7]

The DRPA is a public corporate instrumentality of both the Commonwealth of Pennsylvania and the State of New Jersey created by a compact between the two states. See 36 P.S. § 3503; N.J.S.A. § 32:3-2 et seq. (identical statutes setting forth the

[7]Defendant also argues that plaintiff has not properly plead that he exhausted his administrative remedies under the PHRC. However, since the Court would likely permit the plaintiff the opportunity to correct his pleading unless to do so would be futile, it must be determined if the PHRC even applies to DRPA.

charter of the DRPA). It was created with the approval of congress pursuant to the Compact Clause of the United States Constitution, U.S.Const. Art. I, § 10, cl. 3. As a bi-state entity, it is the compact between the respective states that govern, and neither state may "unilaterally impose additional duties, powers, or responsibilities upon the Authority." Eastern Paralyzed Veterans v. Camden, 545 A.2d 127, 128 (N.J.1988) (quoting Nardi v. Delaware River Port Authority, 490 A.2d 949, 950 (Pa. Commw. 1985). Since Pennsylvania and New Jersey have not expressed an intention to subject the DRPA to the PHRC, the only way the PHRC applies to the DRPA is if New Jersey has complimentary or parallel state legislation.

Plaintiff argues that the New Jersey Law Against Discrimination ("NJLAD"), N.J.S. § 10:5-1, et seq., is substantially similar to the PHRA. Three district courts in this circuit have considered this question, and all three have concluded that the NJLAD and PHRA are not substantially similar. See Clark v. The State of New Jersey, Civ. No. 93-5162 (JBS), slip op. (Simandle J.)(D.N.J. February 27, 1996 (holding that NJLAD does not apply to DRPA); Eick v. Delaware River Port Authority, Civ. No. 91-2707, slip op. (Bassler J.)(D.N.J. Jan. 16, 1992)(holding that NJLAD does not apply to DRPA); Fulton v. Delaware River Port Authority, Civ. No. 97-7875, slip op., n. 13 (holding that NJLAD and PHRA differ significantly and cannot be considered parallel or complimentary legislation).

Further, defendant points to numerous differences between

the statutes, conceded to by plaintiff, including: the PHRA requiring exhaustion of administrative remedies while the NJLAD does not; the NJLAD, in addition to protecting all of the classes the PHRA protects, protects classes based on marital status, affectional or sexual orientation, genetic information, sex or atypical hereditary cellular or blood trait; the NJLAD giving plaintiffs a right to trial by jury, a right not afforded by the PHRA; the PHRA precluding a claim for wrongful discharge if pursuing a claim under the PHRA, while wrongful discharge is a separate cause of action that can be brought in conjunction with the NJLAD; and punitive damages being available under the NJLAD, while not being available under the PHRA.

Plaintiff tries to salvage his claim by arguing for the more permissive "substantial similarity" test applied by some New Jersey courts. Under that test, "[s]eparate legislative acts are complementary or parallel if they are substantially similar in nature....Legislation is substantially similar if the creator states evidence some showing of agreement in the laws involving and regulating a bi-state agency." Local 68 v. DRBA, 688 A.2d 569, 575 (N.J. 1997), citing Eastern, supra, at 401. However, plaintiff can point to no federal court that has adopted New Jersey's more permissive view, and this Court has not been persuaded to become the first.

In light of the opinions of the three district courts in this circuit to consider the issue, and the differences between the NJLAD and PHRA enunciated above, the Court finds that the

NJLAD and PHRA are not complimentary and parallel, and therefore the PHRA cannot be constitutionally applied to the DRPA.

C. Punitive Damages

Finally, DRPA argues that it is immune from punitive damages. Plaintiff concedes that DRPA is immune under Section 1983 and the PHRA, but does not concede that DRPA is immune under Title VII. Since the Court has already ruled that plaintiff cannot maintain his Title VII claim as a matter of law, there is no need to reach his arguments here. All claims for punitive damages against the DRPA shall be stricken.

D. Summary

As a result of the Court's ruling, only counts I and III remain against defendant DRPA, all other counts are dismissed and all claims for punitive damages are stricken.

IV. Supervisor Defendants' Motion to Dismiss

The Supervisor Defendants move to dismiss counts III-VI of plaintiff's Amended Complaint. They argue that count III alleging a violation of plaintiff's civil rights under Section 1983 must be dismissed because plaintiff failed to allege affirmative discriminatory conduct. Count IV will be dismissed consistent with III(B) above.[8] Count V is dismissed against all

[8]Plaintiff argues that the individual Supervisor Defendants are still subject to the Act. This position is in direct contradiction to Fulton, Clark, and Eick described above. Further, plaintiff's reliance on Dici v. Commonwealth of Pennsylvania, 91 F.3d 542 (3d Cir. 1996) is misplaced. Dici concerns the applicability of the PHRA to state employees, while the instant case concerns the applicability of the PHRA to employees of a bi-state entity when the PHRA has been found not to apply to the employer.

defendants. Finally, the Supervisor Defendants argue that Count VI for IIED should be dismissed because plaintiff has not alleged conduct sufficiently outrageous, and because plaintiff has failed to allege physical harm. The court will discuss counts III and VI in turn.

A. Count III

Plaintiff alleges in count III of his Amended Complaint that the Supervisor Defendants violated Section 1983 by denying him equal protection of the laws. To establish supervisory liability under 1983, "there must be some affirmative conduct by the supervisors that played a role in the discrimination." Andrews v. City of Philadelphia, 895 F.2d 1469, 1478 (3d Cir. 1990) (citing Rizzo v. Goode, 423 U.S. 362, 377 (1976). "The necessary involvement can be shown in two ways, either 'through allegations of personal direction or of actual knowledge and acquiescence'...or through proof of direct discrimination by the supervisor. The existence of an order or acquiescence leading to discrimination must be pled and proven with appropriate specificity." Id at 1478 quoting Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988).

Since plaintiff does not plead facts that could be construed as alleging that any of the Supervisor Defendants personally directed discrimination, plaintiff must rely on "actual knowledge and acquiescence" or "proof of direct discrimination by a supervisor." The Court need only consider "actual knowledge and acquiescence" to determine this issue. Reading the complaint

broadly, there are three instances where actual knowledge and acquiescence of all of the Supervisor Defendants is arguably pled. In Paragraph 38, plaintiff alleges that all of the defendants "were aware of the harassing conduct and failed to take reasonable steps to prevent harassment based on disability and gender, to prevent future harassment and to remedy the harassing work environment." In Paragraph 43, plaintiff alleges that the Supervisor Defendants failed to properly investigate plaintiff's complaints. Finally, in Paragraph 44, the plaintiff alleges that "defendants' disability and sexual harassment of Plaintiff was so open, notorious and outrageous that it was known to staff, supervisors and administrators."

Although a close question, the Court concludes that, for purposes of the instant Motion, plaintiff has satisfied his burden. In Andrews the Third Circuit held that a jury could have found that supervisors who clearly knew about ongoing harassment, and did little to remedy or investigate the problems, implicitly encouraged the abuse and acquiesced to the harassment. Id. at 1479. In the instant case, while plaintiff did not specifically plead which individual supervisor had knowledge of a particular discriminatory act, a reasonable inference drawn from the pleadings is that the Supervisor Defendants knew what was going on and did nothing about it, which is equivalent to actual knowledge and acquiescence under Andrews. For this reason, the Court will deny the Supervisor Defendants motion as to count III. These allegations are more appropriately tested in a motion for

summary judgment.

B. Count VI-IIED

In count VI of his complaint, plaintiff makes a claim of IIED against two of the Supervisor Defendants, McCarthy and Tuttak[9].

The history of this tort in Pennsylvania is a murky one, and the Pennsylvania Supreme Court's most recent pronouncement on the issue does little to remedy the tort's uncertain status. While still refusing to formally recognize the tort[10], the Pennsylvania Supreme Court discussed it at some length in Hoy v. Angelone, 720 A.2d 745 (Pa. 1998).

According to Hoy, a claim for intentional infliction of emotional distress must be based on conduct that was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society." Hoy v. Angelone, 720 A.2d 745, 754 (Pa. 1998)(citations omitted).

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[9]Plaintiff also makes this claim against the four Co-Worker defendants, which the Court will address infra.

[10]The Court noted in footnote 10 that they have acknowledged but have never specifically adopted section 46 of the Restatement. Hoy v. Angelone, 720 A.2d 745, 753 (Pa. 1998). The Court left for another day whether or not section 46 of the Restatement should be the law of Pennsylvania because the parties did not raise the issue. Instead, they assumed *arguendo* that the tort exists. Id. at 753 n.10. The Restatement defines the tort as follows:

> One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

Hoy at 753 (quoting Restatement (Second) of Torts §46(1) (1965).

The Court cautioned, however, that "it is extremely rare to find conduct in the employment context that will rise to the level of outrageousness necessary to provided a basis for recovery of the tort of intentional infliction of emotional distress. Id. at 754 (citing Cox v. Keystone Carbon, 861 F.2d 390, 395 (3d Cir. 1988)). The Court further noted that the tort is "reserved by the courts for only the most clearly desperate and ultra extreme conduct[.]" Id. at 754.

Still, the Court did not completely foreclose a claim for IIED in the context of a sexual harassment case. Generally, what is required is sexual harassment plus retaliatory behavior of some sort that reaches the sufficient level of outrageousness, although the Court did allow "for the rare case in which a victim of sexual harassment is subjected to blatantly abhorrent conduct, but in which no retaliatory action is taken." Id. at 754. In Hoy, the sexual harassment, which included "sexual propositions, physical contact with the back of Appellant's knee, the telling of off-color jokes and the use of profanity on a regular basis, as well as the posting of a sexually suggestive picture[,]" did not include allegations of retaliatory behavior. Id. at 754-55. The Court held that this conduct, while unacceptable, "was not so extremely outrageous" to allow recovery under the limited tort of intentional infliction of emotional distress. Id. at 755.

Complicating the instant case are the allegations not only

of sexual harassment and retaliation, but also the allegations of harassing the plaintiff based on his disability.

With that as a background, the Court turns to the instant motion of the Supervisor Defendants, specifically McCarthy and Tutak. According to the Second Amended Complaint, McCarthy and Tutak took plaintiff to a strip bar, paid for a stripper to masturbate for him and Tutak mimicked plaintiff's disabilities. As a result of this conduct, plaintiff claims that he has suffered and continues to suffer extreme emotional, psychological and physical pain, fear, and complete humiliation, causing plaintiff to seek medical treatment from a psychiatrist. The Court finds that plaintiff has sufficiently pled this tort a both as to outrageousness and injury, and therefore finds that dismissal of the claim would be inappropriate at this time. See, Orlando, 1995 WL 710506, at *3 (denying motion to dismiss claim for intentional infliction of emotional distress because plaintiff alleged the requisite elements of the claim); Agresta v. Sambor, 687 F. Supp. 162, 167 (E.D. Pa. 1988) (noting that threshold for surviving a Rule 12(b)(6) motion is very low and denying motion to dismiss claim for intentional infliction of emotional distress); Trichilo, 1992 WL 398405, at *7 (denying motion to dismiss claim for intentional infliction of emotional distress because plaintiff alleged the requisite elements of the claim).

In the alternative, plaintiff argues that this claim can

also be maintained against McCarthy and Tutak a supervisors because of their failure to prevent and/or remedy the hostile work environment. Although the Court has already ruled in plaintiff's favor as to the tort in the context of the supervisors' affirmative conduct, because the Court expects this argument to arise at the summary judgment stage and/or at trial, it is appropriate to address it here.

Both parties maintain that no Pennsylvania court or federal court sitting in Pennsylvania has addressed whether or not supervisors can be held liable for IIED for failing to prevent a hostile work environment. Contrary to the parties' assertions, the Court believes that this issue was addressed in Andrews v. City of Philadelphia In upholding a district court's entry of judgment n.o.v., the Third Circuit stated regarding two supervisors who had some level of participation in the harassment of the plaintiff:

> They should not be held accountable for each individual incident regardless of their participation. Their acts of acquiescence may have contributed to the general environment at AID, but it cannot be said that they personally encouraged, endorsed, or sponsored every incident.

Id at 1487. The Court finds Andrews both applicable and instructive. Based on Andrews, and considering the circumscribed nature of this tort in Pennsylvania, the Court concludes that this claim is not available against McCarthy and Tutak for failure to prevent and/or remedy a hostile work environment since

there are no allegations that they personally encouraged, endorsed, or sponsored every incident. Therefore, the only basis for maintaining this count against McCarthy and Tutak is their affirmative conduct towards the plaintiff.

C. Summary

As a result of this ruling, only count III remains against all Supervisor Defendants, and count VI remains against McCarthy and Tutak. All others will be dismissed with prejudice.

V. Co-Worker Defendants[11] Motion to Dismiss

The Co-Worker Defendants, who are named in counts VI-VIII of plaintiff's Amended Complaint, have moved to dismiss all counts against them. First, they argue that the Court should refuse supplemental jurisdiction over count VI for IIED because it presents a novel issue of state law. They then argue that all three counts should be dismissed because they fail to properly state a claim. The Court will address these arguments in turn.

A. Supplemental Jurisdiction

This Court has supplemental jurisdiction over plaintiff's state law claims under 28 U.S.C. § 1367(a). The Co-Worker Defendants argue that supplemental jurisdiction should be

[11]This Motion is brought by Anthony Gardner, Jack Balkir, and John Pease. Another co-worker, William Kelleher, has brought a separate Motion to Dismiss which will be addressed in section VI infra.

declined under § 1367(c)(1) and (c)(2).[12] The defendants argue that since the Pennsylvania Supreme Court has not adopted the tort of IIED, it therefore presents a novel and complex issue of State law. The Court disagrees. The Third Circuit has predicted that Pennsylvania would recognize the tort. See, e.g., Silver v. Mendel, 894 F.2d 598, 696 (3d Cir. 1990), cert denied, 496 U.S. 926 (1990); Clark v. Falls Twp., 890 F.2d 611, 623 (3d Cir. 1989) Williams v. Guzzardi, 875 F.2d 46, 51 (3d Cir. 1989). The Pennsylvania Supreme Court's recent decision in Hoy does not undermine the Third Circuit's prior rulings on the issue, as the Pennsylvania Supreme Court never reached the question of recognizing the tort, but instead decided to leave that question for another day. Until that day comes, or until the Third Circuit holds differently, this Court finds no basis in Hoy to conclude that Pennsylvania will not recognize the tort. Accordingly, since numerous Pennsylvania courts and federal courts applying Pennsylvania law have recognized the tort and addressed the issue, the Court finds that IIED is not a novel or complex issue of State law justifying a refusal to exercise supplemental jurisdiction.

The Court also rejects defendants' argument in their reply

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[12]The statute states in pertinent part:

> (C) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if-
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> (1) the claim raises a novel or complex issue of State law,
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> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction.

28 U.S.C. § 1367 (c)(1) and (c)(2).

brief that state law claims substantially predominate. The state and federal claims derive from a common nucleus of operative fact, the facts that are essential to both state and federal claims are virtually identical, and the Court has not dismissed several of the federal claims. For these reasons, the Court believes that exercising supplemental jurisdiction in this case best serve the interests of judicial economy, convenience, and fairness.

B. Count VI-IIED[13]

Next, the Co-Worker Defendants move to dismiss plaintiff's IIED claim. Accepting the allegations as true, the Court finds that taping a mentally disabled person to a chair, removing his pants, and throwing soiled toilet paper at him, among other indignities, adequately pleads the necessary "outrageous"[14] conduct required by Pennsylvania law. The Court further finds that plaintiff has sufficiently pled all of the elements of IIED, including physical injury. Accordingly, the Court will not dismiss this count against the Co-Worker Defendants.

C. Count VII-Invasion of Privacy-Intrusion Upon Seclusion

The elements of intrusion upon seclusion are "(1) physical intrusion into a place where the plaintiff has secluded himself

[13]The Court discussed this tort more thoroughly in section IV(B) above.

[14]Defendants also argue that since competence is not at issue, the behavior of the defendants should be judged as if plaintiff was any reasonable member of the community. The Court disagrees. Plaintiff has pled a mental disability, and his disability is certainly something that should and will be considered when evaluating the defendants' conduct towards him.

or herself; (2) use of the defendant's senses to oversee or overhear the plaintiff's private affairs; or (3) some other form of investigation or examination into plaintiff's private concerns." Borse v. Piece Goods Shop, Inc. ,963 F.2d 611 (3rd Cir. 1992). The Court finds that plaintiff has not pled any of the above three elements of this tort, and therefore will dismiss count VII.

C. Count VII-Assault and Battery

Finally, the Co-worker Defendants move to dismiss count VIII of plaintiff's Amended Complaint, arguing that plaintiff has not properly pled the elements of the tort, and that the conduct in the context of the environment in which plaintiff worked cannot be considered offensive.

Under Pennsylvania law, "an assault occurs when one acts with the unprivileged intent to put another in reasonable and immediate apprehension of a harmful or offensive conduct and which does cause such apprehension." Proudfoot v. Williams, 803 F.Supp. 1048, 1054 (E.D.Pa. 1992). A battery is a harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff to suffer such a contact, or apprehension that the contact is imminent. Moser v. Bascelli, 865 F.Supp 249, 252 (E.D.Pa. 1994)(citation omitted).

The Court has little difficulty rejecting both of defendants' arguments. While plaintiff's assault and battery claim could have been more artfully pled, the Court is mindful that Federal Rule of Civil Procedure 8 requires a plaintiff to

assert merely "a short and plain statement of [his] claim showing that [he] is entitled to relief." Fed R. Civ. P. 8. Reading the complaint as a whole, the Court finds that the Rule has been satisfied as to this claim. Further, the Court finds defendants' arguments that the alleged contact was not offensive to be without merit. The plaintiff has not alleged that he engaged in horseplay, or workplace roughhousing with the defendants. Knowing that the Court is restricted to the allegations in the complaint for purposes of this Motion, the Court is somewhat incredulous at the notion argued by defendants that taping plaintiff to a chair, removing his pants, and throwing soiled toilet paper at him is not offensive contact. Obviously, the Court rejects this argument, as well as defendants' motion as to count VIII.

D. Summary

As a result of this ruling, count VII will be dismissed against the Co-worker Defendants, but the Court will retains supplemental jurisdiction over counts VI and VIII, which remain.

VI. William Kelleher's Motion to Dismiss

Defendant William Kelleher has submitted the exact same arguments in support his motion as the Co-Worker Defendants. Accordingly, the Court will dismiss count VII but exercise supplemental jurisdiction over counts VI and VIII.

VII. Conclusion

For the foregoing reasons the Court will grant in part and deny in part defendants' motions so that the following counts

remain: count I and III against DRPA; count III against the Supervisor Defendants; count VI against McCarthy and Tutak; and counts VI and VIII against both the Co-Worker Defendants and William Kelleher. All other counts in the complaint will be dismissed with prejudice, including all claims for punitive damages against DRPA.

An appropriate Order follows.

Clarence C. Newcomer, J.